

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN DIEKMAN,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 02-4681
	:	
v.	:	
	:	
ENERGY CHOICE MARKETING, INC.	:	
ET AL.	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this            day of February, 2003 upon consideration of the Motion of Defendants to Strike Plaintiff's Amended Complaint and the responses of Plaintiff Diekman in response thereto, it is hereby ORDERED that the Motion is DENIED and the Defendant is directed to respond to the Amended Complaint in the time permitted under the Federal Rules of Civil Procedure.<sup>1</sup>

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<sup>1</sup> Under the Federal Rules of Civil Procedure, a party may only file an amended complaint as of right before the service of a "responsive pleading." See Fed.R.Civ.P. 15(a). After service of a responsive pleading, a party may only file an amended pleading with leave of the court. See *id.*

In the present case, two defendants filed an answer, while the other two defendants did not, but instead filed a motion to dismiss the complaint. The Plaintiff filed an amended complaint as to the two defendants that filed a motion to dismiss the complaint. This Circuit has previously held that a motion to dismiss is not a "responsive pleading" within the meaning of Rule 15(a). *Kelly v. Delaware River Land Comm.*, 187 F.2d 98 (3d. Cir. 1951). The two defendants assert that since their claims are a derivative of the claims to which an answer has been filed, plaintiff should have sought leave to amend from the Court.

However, it has been held that "if the amendment affects all defendants or one or more of those defendants that have not responded, then a 'responsive pleading' has not been served for purposes of Rule 15(a) and plaintiff may amend his complaint as of course, with regard to those defendants that have not answered." *Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983)

BY THE COURT:

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J. Curtis Joyner, J.

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quoting 6 C. Wright & A. Miller, Federal Practice and Procedure § 1481 (1971). In addition, leave to amend shall be freely given as justice requires. Unfair prejudice does not exist simply because a party has to defend against a new or better pleaded claim. Id.

In this case, Plaintiff's Amended Complaint only involved claims against the two defendants that did not file an answer. In addition, there has been no prejudice and no delay, as no discovery has yet been taken. Therefore Defendant's Motion to Strike Plaintiff's Amended Complaint is DENIED.